NATIONAL LABOR RELATIONS BOARD **REGION 5**

IN RE:

BERGMAN BROTHERS STAFFING, INC.

Case 05-RC-105509

Respondent,

and

CONSTRUCTION AND MASTER LABORERS' LOCAL UNION 11, LIUNA,

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PETITIONER'S REQUEST FOR REVIEW

The Petitioner, Construction and Master Laborers' Local Union 11, affiliated with the Laborers' International Union of North America, (hereinafter, the "Union" or "Local 11"), files this Request for Review of the Decision and Direction of Election ("DDOE") issued by Wayne R. Gold, Regional Director for Region 5 of the NLRB in the above-referenced proceeding.

Local 11 requests this review in order to request and encourage the Board to overrule Oakwood Care Center, 343 NLRB 659 (2004). The Board's decision in Oakwood states that an election cannot be conducted for a unit consisting of all employees from a temporary staffing agency without consent from its client customers. The Regional Director found that this portion of the Board's opinion was merely dicta and that the holding of Oakwood did not govern this case. See DDOE at 8. Rather than distinguishing Oakwood, the better course is to overrule it. Oakwood constituted an ill-advised departure from prior Board practice, denied a large and rapidly growing portion of the workforce access to the protections of the Act, ignored the economic reality of the modern contingent workforce, and based its decision over concerns about easily solvable problems arising from the manner in which the employment relationship is divided between staffing agencies and its clients.

STATEMENT OF THE ISSUES

- 1. Should the Board overrule *Oakwood Care Center*, 343 NLRB 659 (2004), on the issue of whether the Board can conduct elections for bargaining units consisting of all employees of temporary staffing agencies, where the workers are assigned to multiple, different user employers?
- 2. Should the Board overrule *Oakwood Care Center*, 343 NLRB 659 (2004), on the issue of whether the Board can conduct elections for bargaining units including both jointly- and solely-employed employees from both the user employers and temporary staffing agencies?

FACTS¹

The Employer, Bergman Brothers Staffing, provides employees to perform asbestos abatement services on a project basis for its clients. The Employer seeks out new clients through various means, including unsolicited phone calls, flyers, faxes, and emails. Upon forming a relationship with the Employer, the client signs a two-page temporary employment agreement that, among other things, lists the responsibilities of the Employer and its client. This agreement provides that the Employer will provide employees to its client for a minimum period of four hours, and that their hourly rates will be in effect for four months. The Employer provides all of the employees' compensation, including the employer portion of payroll taxes, and requires its clients to acknowledge they will be billed for overtime pay for non-exempt employees when applicable. The agreement also recites that the Employer "expends considerable time, effort, and expense in recruiting, screening, and training temporary employees who fill CLIENT positions"

2

¹ The Statement of Facts consisted entirely of the facts as found by the Regional Director. Petitioner takes no exception to these findings and recites them in full herein.

(emphasis in original).

The agreement provides that the Employer's client is responsible for the "direction and supervision" of employees dispatched by the Employer to the client's jobsite, for recording the time worked by each employee, and for verifying the accuracy of the amount of hours shown on each employee's timecard.

In most cases, the Employer and its client will sign another agreement (labeled as an exhibit to the temporary employment agreement) at the start of a specific job. This exhibit includes details about the specific project and the hourly rates for the employees dispatched to that job. The Employer's CEO and President Gilberto Bergman testified that the Employer's average project lasts a week to two-and-a-half weeks, though the record shows some jobs can be as short as a few hours and some as long as five-and-a-half weeks.

The Employer recruits employees through advertisements in newspapers, radio stations, word of mouth, flyers, community gatherings, and other means. After concluding that an employee is qualified, the Employer maintains a database of employees, which includes records such as the employee's contact information, tax information, and states in which the employee is licensed.

Employees sign a one-page application and a two-page "Standards of Performance for Bergman Brothers Staffing," in which an employee states that he or she agrees not to accept employment from clients of the Employer until the employee has completed working 120 days or 688 hours through the Employer. The Employer's agreement with its clients has a similar restriction on its clients hiring the Employer's employees directly or through a competing temporary staffing agency. However, Bergman testified that "all" of the Employer's employees perform work for competing temporary staffing companies. Bergman testified that employees

sometimes continue working for the Employer past the conclusion of their assignment if the Employer has upcoming projects to which to reassign them. The Employer's application requires employees to acknowledge that "[w]hen any assignments with [the Employer] end, I agree to contact [the Employer] immediately for further assignments, and I understand that if I fail to contact [the Employer] I may be considered to have left work voluntarily without cause and unemployment benefits may be denied." The "Standards of Performance for Bergman Brothers Staffing" provides in part:

I am an employee of Bergman Brothers staffing (BBS)... I understand that I am an employee of BBS and only BBS or I can terminate my employment. As a condition of employment, I understand that I must contact BBS for available work by reporting to BBS within 24 hours of the conclusion of each work assignment.

Consistent with the statement on the application, Bergman testified that at the conclusion of an assignment, employees are supposed to contact the Employer and report if they're available for additional work. The Employer will use these employee reports, its extant database of employees, and any new applicants to fill upcoming jobs for its customers. When a job arises, employees are told the type of job, location, the rate of pay, and other details. If the employee accepts the job, he or she reports to the jobsite, and the on-site supervision is performed by the Employer's client.

According to Bergman, the end of the job is usually obvious to the employees because the work they were assigned is completed. In some cases, a project may end early, for example, if there are intervening problems at the site. Similarly, a project may last longer than what employees were initially told. At the project's conclusion, employees are released directly by the Employer's client. Bergman testified that if the Employer doesn't immediately dispatch employees for additional work, they are not fired, but are laid off until there's more work.

The Employer and its clients each handle essential aspects of employees' terms and conditions of employment. The Employer handles matters such as recruitment, hiring, setting wage rates, and determining which projects employees are assigned to. The clients are responsible for the direct supervision of the employees and recording their hours worked.

PROCEDURAL HISTORY

On May 20, 2013, Local 11 filed petitions for elections involving the employees of three joint employers: Bergman/Waco, Inc., Bergman/Colt Insulation, Inc., and Bergman/Versitech, Inc.

At the hearing held on June 4, 2013, the parties stipulated that there is no joint employer relationship between Bergman and its client customers—Waco, Inc., Colt Insulation, Inc., and Versitech, Inc.—and that a unit of employees of Bergman would be a sole-employer unit. Based upon this stipulation, the Petitioner withdrew petitions insofar as they were directed against any of Bergman's customers. Petitioner relied upon this stipulation in requesting the approval of a unit consisting of all employees employed by Bergman Brothers in the State of Maryland, regardless of the user employer to whom the employees are assigned, notwithstanding the NLRB's rules under *Oakwood*.

The Regional Director, however, declined to accept this stipulation, finding that the stipulation was "contrary to the evidence in the hearing record." DDOE at 6. The Regional Director found that "the evidence shows that the particular relationships between the Employer and each of its clients (Waco, Inc., Colt Insulation, Inc., and Versitech, Inc.) discussed at the hearing are consistent with the Employer's joint-employer business model." *Id.*

THE APPROVED UNIT

The Regional Director approved the following as an appropriate unit:

All full-time and regular part-time licensed or certified asbestos abatement employees, including employees performing asbestos abatement of mechanical systems, working in the State of Maryland of whom the Employer is an employer, excluding office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

ARGUMENT

I. OAKWOOD SHOULD BE OVERRULED IN ITS ENTIRETY.

The sole purpose of this request for review is to request that the Board overrule *Oakwood Care Center*, 343 NLRB 659 (2004). The touchstone of the contingent work force in the modern economy is the flexibility it offers employers, yet in *Oakwood*, the Board incompatibly imposed an extremely rigid rule for bargaining units in this sector. This mismatch between the law and economic realities must be fixed to keep the law relevant to today's circumstances. The better course is to return the flexible framework of *M.B. Sturgis*, 331 NLRB 1298 (2000).

Employees should not be limited to the sole option of trying to organize units consisting solely of those employees employed by the joint employer of the staffing agency and the user employer. Rather, the employees should have the option of organizing as a unit consisting of both jointly- and solely-employed employees. Or, employees should be able to organize a unit, as here, consisting of all employees employed by the staffing agency, regardless of the user employer to whom they are assigned.

The Board should make this change for several reasons. First, the rule of *M.B. Sturgis* is fully consistent with the Act, and therefore should be restored on policy grounds. Second, the premise of *Oakwood* – that a multiemployer bargaining unit is created by combining employees of a user employer and a staffing agency or by a unit consisted of all employees of the staffing

agency – is false; this premise is contrary to the economic realities of situation, as is plainly demonstrated by this case. Third, as found by the Regional Director, *Oakwood* essentially makes it impossible for workers like those employed by Bergman Brothers to organize, and the Act should be interpreted, wherever possible, to facilitate rather than frustrate the ability of workers to organize.

A. It Is Necessary to Overrule *Oakwood* to Approve this Unit.

Oakwood must be overruled to approve this unit. The Regional Director evaded this conclusion by finding the present case distinguishable from Oakwood. The Regional Director explained his legal reasoning as follows:

Commenting on what it characterized as dicta in *M.B. Sturgis*, 331 NLRB 1298 (2000), the *Oakwood* Board wrote that petitions naming only one joint employer "create additional bargaining difficulties for employees" explaining that "...a petition that names only the user employer potentially saddles the jointly employed employees with a representative that will be unable to bargain with the [supplier] employer that controls their wages." *Id.* at 663. It is somewhat of a paradox, then, that the Board's statements about *dicta* in *Sturgis* is, in fact, *dicta* in *Oakwood* because the issue before the Board in *Oakwood* was the propriety of a petition that named both joint employers, not one of them.

DDOE, at 8.

While the Regional Director correctly observed that *Oakwood* did not involve a unit like the one here, the unit here nevertheless cannot be reconciled with the reasoning and statutory interpretation of the *Oakwood* Board. If the one true employer of employees of a temporary staffing agency is the joint employer entity, A/B, as the *Oakwood* Board emphatically ruled, then it is equally impermissible to approve a unit of only A or only B. *See Oakwood*, 343 NLRB at 662 ("All of the unit employees work for a single employer, i.e.,

the joint employer entity A/B. Therefore, a joint employer unit of A/B is not a multiemployer unit."). Under the *Oakwood* framework, the current unit *is* a multiemployer unit, i.e., one consisting of multiple joint employers. Here, for instance, those joint employers are Bergman/Waco, Bergman/Colt, and Bergman/Versitech.

Oakwood, therefore, is not distinguishable. It must be overruled in order to affirm the Regional Director's otherwise fully appropriate Direction of Election.

B. Sturgis Is Consistent with § 9(b) of the Act.

Oakwood is predicated upon the conclusion that *Sturgis* was inconsistent with the Act because it created multiemployer units in violation of § 9(b), which only permits elections of employees of individual employers. This conclusion, however, is based upon a very peculiar interpretation of how to incorporate the joint employer concept into § 9(b). Noting that § 9(b) permits appropriate units consisting of "the employer unit, craft, unit, plaint unit, or subdivision thereof," the *Oakwood* Board determined that the only individual employer unit possible for contingent workers was a unit of the joint employer A/B. *See Oakwood*, 343 NLRB at 662.

This conclusion is a striking example of elevating form over substance. It should be remembered, after all, that the joint employer doctrine is a *legal fiction* whose purpose is to expand the scope of liability to affix it more flexibly where warranted by the facts. *See NK*.

Parker Transport, 332 NLRB 547, 548 (2000); Capitol EMI Music, 311 NLRB 997, 999 (1993), enfd. mem. 23 F.3d 399 (4 Cir. 1994); NLRB v Browning-Ferris Industries, 691 F.2d 1117, 1122 (3d Cir. 1982) A legal fiction, however, should not be permitted to become the kind of impediment to advancing the goals and purposes of the Act that the Oakwood Board insisted it must be. The current unit of Bergman Brothers staffing is a unit of a single employer, i.e., of Bergman Brothers Staffing. The joint employer doctrine does not transmogrify the current unit

into a multiemployer unit, and only a sense of unchecked legal fussiness would insist otherwise. Similarly, the unit present in *Oakwood* containing jointly and solely employed employees was a unit of an individual employer, i.e., of Oakwood Care Center.

In sum, the *Sturgis* Board had it right:

That a unit of all of the user's employees, both those solely employed by the user and those jointly employed by the user and the supplier, is an "employer unit" within the meaning of Section 9(b) is logical and consistent with precedent. The scope of a bargaining unit is delineated by the work being performed for a particular employer. In a unit combining the user employer's solely employed employees with those jointly employed by it and a supplier employer, all of the work is being performed for the user employer. Further, all of the employees in the unit are employed, either solely or jointly, by the user employer. Thus, it follows that a unit of employees performing work for one user employer is an "employer unit" for purposes of Section 9(b).

Sturgis, 331 NLRB at 1305.

C. The Premise of *Oakwood*, that Units of Temporary Staffing Agency Employees Create Multiemployer Units, Is False.

This case vividly illustrates that the premise of *Oakwood* is entirely wrong in holding that temporary staffing agencies necessarily create multiemployer units unless they are limited to employees employed by the joint employer entity consisting of the user employer and the staffing agency. Consider what occurred here: The user employers all stipulated that there was no joint employer relationship with Bergman Brothers, even though, as pointed out by the Regional Director, there plainly is one. Why would the user employers do this? Because they perceived absolutely no interest whatever in whether the employees of Bergman Brothers organized or not. They considered their involvement in this case a complete waste of their time. So they accepted a counterfactual stipulation just to be done with situation.

This perverse result is a necessary product of the *Oakwood* framework, and it shows just how out of touch the *Oakwood* framework is from reality. The economic reality of the situation is that the user employer has no interest in the terms of employment that the staffing agency sets for its employees, except insofar as it effects the rates that the staffing agency charges the user employer. Similarly, most staffing agencies do not care what terms the user employer sets with regard to supervision. Such indifference never occurs with a true multiemployer unit, in which employers voluntarily enter into the arrangement to promote industrial stability. *See Retail Associates*, 120 NLRB 388 (1958). In the case of true multiemployer units, "the employers are entirely independent businesses, often compete with each other, operate at separate locations on different work projects, and hire their own employees. They have nothing in common except that they operate in the same industry." *See Oakwood*, 343 NLRB at 6667 (Members Liebman and Walsh, *dissenting*).

This case also illustrates that *Oakwood* creates exactly the kind of "nightmare" for employers that the dissenting Members of the *Oakwood* Board predicted. *See Oakwood*, 343 NLRB at 669 (Members Liebman and Walsh, *dissenting*). It makes no sense to yoke the user employers to the collective bargaining process of a company whom the user employer regards as a mere vendor. User employers will always prefer to part ways with their vendor, the staffing agency, rather than become embroiled in a collective bargaining process in which they have no real interest. Further, it makes no sense to subject the right to organize of staffing agency employees to a veto from user employers who are manifestly indifferent to their bargaining efforts. Imposing such a veto constitutes an undue burden upon the contingent employees' right to organize. In sum, *Oakwood* is poor policy that does not fit the economic realities of today's workplace for employees or employers.

D. Oakwood Effectively Precludes the Ability of Contingent Employees to Organize.

In approving the proposed unit for an election, the Regional Director was persuaded that following *Oakwood* effectively would preclude this type of employee from organizing under the Act. On this, the Regional Director is wholly correct, and his reasoning provides an additional reason for overruling *Oakwood*. For that reason, I will excerpt his comments on this topic below:

My conclusion here affords employees the greatest opportunity to exercise the rights guaranteed by Section 7 of the Act, specifically, by allowing the unit employees to determine for themselves whether they wish to select the Petitioner to represent them. Were I to conclude that *Oakwood* requires any petition to name both joint employers, the employees herein would effectively he denied any opportunity to exercise their statutory rights. The Employer receives little advance notice of when its clients will need employees, and those client projects typically are of relatively short duration. Even assuming a labor organization could file a petition simultaneously with the Employer securing the project from its client, it is unlikely that the Board would be able to conduct an election before the project was complete, let alone engage in any meaningful bargaining. Moreover, this futile process would have to be repeated for each of the Employer's clients, despite that the same employees of the Employer may immediately transition from Client A's jobsite to Client B's jobsite. The result would be a fleeting and ultimately illusory opportunity for the Employer's employees to exercise their rights to bargain collectively. In reality, it would leave them permanently unable to organize. Instead, by focusing on the employees' broader and ongoing relationship with the Employer, their Section 7 rights are not lost by focusing on the narrow and brief duration of each client assignment — rightly keeping the forest more prominent than its trees

DDOE, at 9.

E. The Oakwood Board's Concerns About Fragmentation of the Bargaining **Process Are Misplaced.**

The fact that no single business enterprise exercises complete control over the terms and conditions of employment for contingent workers does not provide a reason to deny them the ability to bargain collectively. The Oakwood decision is a classic instance of making the perfect the enemy of the good. As a matter of common sense, the fact that only partial collective bargaining is readily available to contingent workers cannot logically justify denying them any collective bargaining.

In addition, long-standing Board precedent permits collective bargaining even when an employer does not exercise control over the entire employment relationship. See Volt Technical Corp., 232 NLRB 321 (1977); All-Work Inc., 193 NLRB 918, 919 (1971). See also, People Care, Inc., 311 NLRB 1075, 1077 fn. 1 (1993). Returning to the rule of Sturgis, therefore, is more consistent with the total body of the Board's law than is retaining Oakwood.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that the Board overrule Oakwood, restore the rule of Sturgis, and otherwise affirm the Decision and Direction of Election of the Regional Director in full.

July 5, 2013 Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing REQUEST FOR REVIEW was served on the parties identified below by First Class Mail:

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